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Acting Assistant Attorney General  
Criminal Division  
United States Department of Justice  
10th Street & Constitution Ave., N.W.  
Washington, D.C. 20530

**CONFIDENTIAL**

Re: Conduct of Bruce C. Swartz and Robert E. O'Neill  
in the Office of Independent Counsel's Prosecution  
of United States of America v. Deborah Gore Dean,  
Criminal No. 92-181-TFH (D.D.C.)

Dear Mr. Keeney:

This letter and the enclosed materials are provided for the purpose of bringing to your attention matters concerning the fitness of two individuals under your supervision to serve as attorneys for the United States Government. The individuals are Bruce C. Swartz, a Special Assistant in your office, and Robert E. O'Neill, an Assistant United States Attorney in the Middle District of Florida. The matters involve ethical abuses by Mr. Swartz and Mr. O'Neill while serving as Associate Independent Counsel and Deputy Independent Counsel in the Office of Independent Counsel Arlin M. Adams during its prosecution of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.). There is reason to believe that the abuses may involve the violation of federal laws.

These matters have previously been brought to the attention of the Department of Justice in connection with my efforts to persuade the Attorney General to investigate the Office of Independent Counsel's conduct in its prosecution of the Dean case, and to persuade White House Counsel Abner J. Mikva to recommend to the President the removal of Assistant Attorney General Jo Ann Harris because her conduct as an Associate Independent Counsel in that case indicated that she was not fit to oversee the conduct of federal prosecutors. Officials within the Department of Justice who are knowledgeable concerning this matter include Associate Deputy Attorney General David Margolis and Michael E. Shaheen, Jr., Counsel for the Office of Professional Responsibility.

The binder marked "Correspondence" contains a record of the correspondence concerning those efforts. My August 15, 1995 letter to Mr. Shaheen, which is the first item in the binder, provides a summary of the actions I took and certain of the issues I raised in bringing these matters to the attention of the Attorney General and the White House Counsel. It also responds to Mr. Shaheen's explanation for the decision of the Department of Justice not to take action in this matter. The remainder of the pertinent correspondence with the Department of Justice and the White House Counsel may be found as attachments to my letter to Mr. Shaheen. The final item in the binder is a September 18, 1995 letter to Larry D. Thompson, successor to Arlin M. Adams as Independent Counsel, bringing the same matters to Mr. Thompson's attention.

The binder marked "Materials" contains a 55-page document styled "Introduction and Summary," which introduces the materials and summarizes various matters addressed in greater detail in ten documents termed Narrative Appendixes that were provided to the Attorney General along with the Introduction and Summary on December 1, 1994. That binder also contains individual summaries of each of the ten Narrative Appendixes and of an eleventh Narrative Appendix that was provided to the Department of Justice at a later date. Behind the final tab is an index to a diskette, also enclosed, that contains copies of all eleven Narrative Appendixes formatted in WordPerfect 5.1. The Narrative Appendixes are quite voluminous, ranging in size from eight to 85 pages, and some have extensive attachments. Since the Department of Justice has already been provided two copies of each Narrative Appendix and its attachments, I am not including additional hard copies of these items at this time.

Since even the Introduction and Summary is quite involved, you may find it useful first to review the more succinct summaries of certain issues in the September 18, 1995 letter to Mr. Thompson and the August 15, 1995 letter to Mr. Shaheen (some of which issues I also summarize below). You may also find it useful to review at the outset the individual summaries of all eleven Narrative Appendixes. Those summaries may be found under the third tab of the Materials Binder as well as in Attachment 2 to the letter to Mr. Shaheen. Some of the matters addressed in the materials were raised in the district court or the court of appeals. Others, including certain of what appear to be the more serious matters, were not addressed at all in the courts.

I think you will find that the materials demonstrate that Bruce Swartz and Robert O'Neill were directly involved in prosecutorial abuses of exceptional dimensions. To take as

examples things that are in no manner open to question, the materials show that Independent Counsel attorneys, including Bruce Swartz and Robert O'Neill, crafted an indictment containing inferences or explicit statements that an immunized witness or documentary evidence specifically contradicted; that those attorneys wrongfully withheld statements indicating that the inferences or statements were false while explicitly representing to the court that they were aware of no exculpatory material; that those attorneys contrived to cause the jury to believe that a conspiratorial reference in a document to "the contact at HUD" was a reference to the defendant even though an immunized witness had told them that the reference was not to the defendant; and that those attorneys sought to lead the jury or the courts to believe that the defendant had provided certain internal government documents to a consultant even though they knew that the defendant had not provided the documents. Also not open to dispute is that Independent Counsel attorneys relied on government witnesses whose testimony those attorneys had compelling reason to believe was false, without confronting the witnesses with information that might be expected to lead them to tell the truth, and failed to correct testimony of government witnesses that Independent Counsel attorneys knew to be false.

Further, as indicated in the letter to Mr. Thompson, assuming that the statements made in my affidavit are true, it seems a virtual certainty that Independent Counsel attorneys relied on the false testimony of a government agent to secure a conviction in this case, and did so in circumstances that most observers would regard as patent race-mongering. Most reviewers of these materials would reach that conclusion even without regard to my affidavit.

You will note, however, that the Office of Professional Responsibility determined that the Department of Justice ought not to investigate the conduct of the Office of Independent Counsel. It did so principally because, in the view of the Office of Professional Responsibility, "no outrageous government misconduct appears to have occurred," and, in light of the departure of the involved attorneys from the Office of Independent Counsel, further investigation by the Department of Justice was "not likely to deter any improper or unlawful conduct." See Letter from Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility to James P. Scanlan at 1-2 (June 28, 1995) (Attachment 11 to my letter August 15, 1995 letter to Mr. Shaheen). For reasons discussed in my letter to Mr. Shaheen, I think most citizens fully informed on this matter would disagree with Mr. Shaheen's conclusion that no outrageous government misconduct occurred and, moreover, would be much

distressed that the Department of Justice does not consider the described conduct outrageous. Further, whatever the relevance of the departure of the involved attorneys from the Office of Independent Counsel may have had with regard to the decision of the Department of Justice not to investigate that office, the matter obviously has no bearing on the responsibility of the supervisors of involved individuals to determine their fitness to serve as attorneys in the Department of Justice in light of documented behavior in the referenced case.

Several paragraphs below I summarize three matters treated in detail in the enclosed materials. In considering these materials you should be mindful that the district court, though concluding that a new trial was not warranted, would find that Independent Counsel attorneys had engaged in serious misconduct that included misrepresentations to the court and the use of government witnesses despite evidence that the witnesses were testifying falsely. After observing with respect to a particular matter that Robert O'Neill had acted in a manner the court would not expect from any Assistant United States Attorney who had appeared before it, the court observed more generally:

It evidences to me in the Independent Counsel's Office, where there were Brady requests made a long time ago, statements that there were no Brady materials, which is obviously inaccurate, where these witnesses are put on that I've just reviewed, where there was substantial questions and information that they may not have been telling the truth in the prosecution's files or the prosecution didn't ask if they were telling the truth to make sure they were before they went on the stand, it evidences to me by the Independent Counsel's Office at least a zealously that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors I'm very familiar with, and that concerns the Court and is not the first time I've seen it in Independent Counsel cases.

Further, some weeks ago it came to my attention that the District of Columbia Bar, on its own initiative, had commenced an investigation into the conduct of Independent Counsel attorneys in the prosecution of the Dean case. Accordingly, I recently provided the same materials I had previously provided to the Department of Justice and Independent Counsel Larry D. Thompson to the Disciplinary Board of the District of Columbia Bar.

Many of the matters addressed in the materials involve Count One of the Superseding Indictment, which alleged that Deborah

Gore Dean had caused certain decisions to be made by the Department of Housing and Urban Development (HUD) in order to benefit former Attorney General John N. Mitchell, whom Dean regarded as a stepfather. That count would be the focal point of the Office of Independent Counsel's (OIC's) case and issues concerning that count would play a predominating role in Robert O'Neill's effort in closing argument to destroy Dean's credibility in the eyes of the jury. Though four projects were involved in Count One, most of the attention would be given to two moderate rehabilitation projects. The first of these was a project in Dade County, Florida, called Arama, regarding which Dean was alleged to have been involved in a conspiracy with Mitchell and former Kentucky Governor Louie B. Nunn. The second was a project called Park Towers, also in Dade County, Florida, regarding which Dean was alleged to have been involved in a conspiracy with Mitchell and a political consultant named Richard Shelby. Ultimately, with regard to Count One, the court of appeals would hold that there was sufficient evidence to sustain a conviction only as to the Arama project. The three matters addressed under the headings below all relate to Count One. All involve the use of testimony that OIC attorneys had compelling reason to believe was false.

A. Testimony of Supervisory Special Agent Alvin R. Cain, Jr.

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

A critical issue with regard to all aspects of Count One was whether Dean was aware that Mitchell earned HUD consulting fees. Richard Shelby, testifying with immunity, stated that he deliberately concealed Mitchell's involvement in Park Towers from Dean. Mitchell's partner, Colonel Jack Brennan, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he or she knew or thought that Dean was aware of Mitchell's HUD consulting.

Dean denied knowing that Mitchell earned HUD consulting fees before she read the HUD Inspector General's Report when it was issued in April 1989. The report had stated that Louie B. Nunn paid Mitchell \$75,000 for assistance in securing funding in 1984 for the Arama project. Dean gave emotional testimony about calling HUD investigator Alvin R. Cain, Jr., who had prepared the report, to express her anger about statements in the report that Mitchell earned the \$75,000 consulting fee and to demand to know

if there was a check proving that Mitchell earned that fee. Specifically, Dean described how she had sent Mitchell's daughter, Marti Mitchell, to pick up a copy of the report from Agent Cain. She stated that she opened the report and saw the discussion of Mitchell's consulting in the report. Dean then testified as follows:

Q. Okay. After you learned -- was that the first time you knew that John Mitchell was receiving dollars based on consulting with HUD?

A. Yes.

Q. This was in May -- or, I'm sorry, April of 1989.

A. Yes, the day the report came out.

Q. Was John Mitchell alive, or had he passed away by then?

A. He had died the previous November.

Q. Did you place any telephone calls after you heard that in the report -- after you discovered that information.

A. Yes.

Q. Who did you call.

A. I called Al Cain.

Q. What did you say to Mr. Cain?

A. I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, that John would never have done that, and that he better be prepared, because I was really mad, and I wanted to see the check, and if there had been a check written to John Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in any way had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.

And Al said, Al told me that he --

Tr. 2617-18.

Dean started to testify as to what Cain had told her when she called him, but an objection to that testimony was sustained.

Dean then testified that she had called Jack Brennan after she called Agent Cain and Brennan led her to understand that Mitchell had also been involved with Richard Shelby. Tr. 2619.

It would have been an extraordinary thing for Dean to testify about this call to Agent Cain if she had not in fact called him. That she had called Cain in April 1989 hardly corroborated Dean's statement that she had been previously unaware of Mitchell's HUD consulting, particularly since she could have called Cain simply to divert suspicion. And whatever the probative value of her statements about calling either Cain or Brennan, the testimony about calling Cain added little to the testimony about calling Brennan, which was entirely consistent with Brennan's own testimony. More significant, Dean was aware that at the time she testified Cain was assigned to the OIC and was therefore readily available to contradict her testimony if it was not true. Further, if Dean fabricated the story about calling Cain she was apparently ready also to fabricate a story of what Cain had told her notwithstanding that Cain was available to contradict her. And, since Cain was an African-American and Dean was being tried before an entirely African-American jury, she would have reason to expect that for Cain to contradict her would have a devastating impact on her credibility.

Apart from the implausibility of Dean's making up a story about the call if it did not occur, I personally had additional reason to believe that Dean had called Cain to ask about a check, because she had told me about it immediately after she made the call. She also had told me that Cain had told her that there was a check but that it was maintained in a HUD field office.

Associate Independent Counsel Robert O'Neill cross-examined Dean for most of three days following her testimony about the call to Cain, but in that cross-examination would ask her nothing about the call to Cain.<sup>1</sup> Within an hour after Dean left the

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<sup>1</sup> The Cain Narrative Appendix (at 35-36) leaves open the question of the involvement of Bruce Swartz and Arlin Adams in the decision to call Cain to contradict Dean at trial. In that regard, however, the following should be noted. Dean testified about calling Cain on her third day of direct testimony, Tuesday, October 12, 1993. Her cross-examination commenced on Thursday, October 14, 1993, and continued through Monday, October 18, 1993. Cain also testified on Monday, October 18, 1993, shortly after Dean left the stand. On the morning of Monday, October 18, 1993, O'Neill advised the court that on Sunday, October 17, 1993, Adams had come from Philadelphia to talk about the case, stating that "we all talk about the case." Tr. 3051. Presumably, Swartz would

stand, however, the OIC called Agent Cain as its second rebuttal witness. Questioned by O'Neill, Cain first testified, in details essentially consistent with Dean's testimony, about providing Dean a copy of the HUD Inspector General's Report. Tr. 3197-98. O'Neill then elicited the following testimony from Cain:

Q. At or about that date, do you recall any conversation with the defendant Deborah Gore Dean in which she was quite upset with you about the contents of the report?

A. No, I do not.

Q. Do you recall her mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report?

A. No, I do not.

Q. Do you recall her telling you that she was going to hold a press conference to denounce what was in the report?

A. Absolutely not.

Tr. 3198-99.

Though Agent Cain merely testified that he did not recall Dean's mentioning the several things noted in O'Neill's questions, Cain's testimony, following his detailed recounting of providing a copy of the report to Dean, was delivered in a manner clearly to suggest he would have remembered the call if it had occurred. Moreover, it is difficult to believe that he would not remember the call if it occur.

The following day, Dean requested permission to present surrebuttal as to Cain. Associate Independent Counsel Paula A. Sweeney "strenuously object[ed]," and the court denied the request.

The next day, in closing argument, after asserting that Dean's defense rested entirely on her credibility, O'Neill repeatedly asserted that Dean had lied to the jury. The

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have been present at such meeting, and the intention to call Cain the following day to contradict Dean would have been discussed.



pervasiveness of O'Neill's assertions that Dean had lied is not paralleled in reported federal cases. A fairly comprehensive summary of the remarks is set out in Attachment 2 to the Introduction and Summary. A sampling of the statements follows:

Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her..she lies about that.. if she's going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("I told you during closing argument that Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it").

In attacking Dean's credibility, O'Neill relied heavily on two witnesses. One of these was HUD driver Ronald L. Reynolds. The court would later find that the OIC had information indicating that Reynolds' testimony was not true. See Narrative Appendix styled "Testimony of Ronald L. Reynolds." The other witness on whose testimony O'Neill relied heavily in attacking Dean's credibility was Agent Cain.

Three quarters of the way through the first day of the O'Neill's closing argument, he pressed the attack on Dean's credibility with particular acerbity, stating:

Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees, pointing to Agent Cain's contradiction of Dean's testimony about calling him to question the treatment of Mitchell in the HUD Inspector General's Report. O'Neill stated the following:

Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave. That's exactly what she told you.

So we had to call in Special Agent Alvin Cain for two minutes' of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that.

Tr. 3419-20.

During rebuttal the following day, while continuing the attack on Dean's credibility, O'Neill again turned to Cain, asserting:

Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never ever happened.

Tr. 3506.

In support of a motion for a new trial, Dean argued that Agent Cain was one of at least three government witnesses who had lied and who Independent Counsel attorneys knew or should have known had lied. (The others are Thomas T. Demery and Ronald L. Reynolds, who, as noted, is another witness on whose testimony O'Neill placed great weight in closing argument in asserting that Dean had lied about her knowledge of Mitchell's HUD consulting.)

Dean provided an affidavit stating that when she asked Agent Cain about the check from Nunn to Mitchell, Cain said it was maintained in the HUD regional office.

In her affidavit Dean also stated that, after talking to Agent Cain, she told me, whom she had been dating at the time, about her call to Cain, including what Cain had told her. At the time of Dean's motion, I was an Assistant General Counsel with the Equal Employment Opportunity Commission, then with more than twenty years of service as an attorney for the federal government. I provided an affidavit describing my background and stating that in April 1989 Dean had told me about the call to Agent Cain and had said that Cain had told her the check was in a field office. I stated that Dean had also told me about her call to Mitchell's partner, who had informed her that Mitchell's HUD consulting was more extensive than that reflected in the report.

I provided reasons why I remembered these matters very well. In her memorandum, Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.

When Dean's motion was filed, the principal trial counsel in the case, Robert E. O'Neill and Paula A. Sweeney, were no longer with the OIC. Deputy Independent Counsel Bruce C. Swartz assumed the role of lead counsel in the case.

In its opposition to Dean's motion, the OIC said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. The OIC dismissed my affidavit in a footnote, observing:

The affidavit of James Scanlan adds nothing in this regard, for Mr. Scanlan -- aside from his obvious bias -- has no firsthand knowledge of defendant's purported conversation with Agent Cain. Rather, he relies solely on what defendant told him.

During the three-week period between the filing of the Dean's motion on November 30, 1993, and the OIC's filing of its opposition on December 21, 1993, the OIC did not interview me to

attempt to determine whether I was telling the truth about my conversation with Dean in 1989, nor would the OIC seek to interview me during the ensuing period when the OIC continued to rely on Cain's testimony.

In a reply, Dean noted that the OIC's failure to discuss the check suggested that the check was in fact maintained in a field office in April 1989 and the OIC did not have a plausible theory as to how she could have learned that other than through her call to Agent Cain. With regard to my affidavit, Dean noted that my relationship to Dean was a legitimate issue to be explored in a hearing, but was not a basis for ignoring the affidavit entirely.

With regard to the fact that I had only recounted what Dean had told me, Dean argued that, given the circumstances in which she told me of the conversation with Cain in 1989, it was virtually inconceivable that Cain and I were both telling the truth.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the probation officer, Independent Counsel Arlin M. Adams relied on Cain's testimony in arguing that Dean committed perjury during her trial and should therefore have her sentence increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the probation officer agreed, recommending a two-level upward adjustment that would increase Dean's minimum sentence by six months.

On February 14, 1994, the court denied Dean's motion for a new trial. The court essentially agreed with Dean's claims that Ronald Reynolds and Thomas Demery had lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Agent Cain and the OIC's heavy reliance on Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the OIC's failure to respond regarding the whereabouts of the check in April 1989 is probative that OIC attorneys knew that Cain lied. Dean noted the additional importance of the matter in light of the probation officer's acceptance of the OIC's argument that Cain's testimony contradicting Dean about the call showed that she lied during the trial. Dean also argued that, whatever may have been the OIC's knowledge regarding the truth of Cain's testimony at the time of trial, the OIC had continued to rely on the testimony having the additional information provided in the Dean and Scanlan affidavits as well as the opportunity to investigate such matters as the whereabouts of the check in April 1989.

Dean requested the court to defer final ruling on her motion for a new trial and on sentencing until the matter of the whereabouts of the check was resolved. Dean argued that, if the

check was maintained in a field office in April 1989, there should be discovery as to whether the OIC knew or should have known that Cain committed perjury and whether such perjury should be imputed to the OIC.

At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. Arguing for the OIC, Deputy Independent Counsel Bruce Swartz refused to state what the OIC knew about the whereabouts of the check in 1989, but argued that Dean could have surmised that the check was maintained in a field office through a statement in an interview report in the HUD Inspector General's Report. The statement to which Swartz referred, however, could not reasonably have provided a basis for Dean's knowledge. Nor does it seem remotely possible that the Swartz could in fact have believed that the statement formed the basis for Dean's statements regarding the whereabouts of the check. Indeed, the context of the interview report suggested that it was very unlikely that the regional office would have gone to the trouble to secure a copy of the check by April 1989, much less that it would have secured a check and then failed to forward it to Washington along with the interview report. Swartz did not state whether the OIC maintained that Dean had surmised that the check was maintained in a field office from the interview report when in April 1989 she informed me that Cain had said the check was maintained in the field, or that the surmise was recent and that I had falsely stated in my affidavit that in April 1989 Dean had told me that Cain had told her the check was maintained in the field.

The court denied Dean's motion without indicating what it believed regarding how Dean came to claim that Agent Cain told her that the check was maintained in a field office and without specifically indicating whether it believed Cain or Dean was telling the truth about the call. The court merely stated that the evidence put forward "doesn't mean of necessity that the government is putting on information they knew was false."

Later in the hearing, however, without taking argument on the issue, the court refused to accept the probation officer's recommendation to increase Dean's sentencing level on the basis of Agent Cain's contradiction of Dean's statement about her call to him. The court stated that it believed that Dean may have in fact called Cain. But the court did initially accept the probation officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement Dean had made that she was not very close to John Mitchell until after she left HUD. The court would later reverse that ruling after concluding that the statement on which the OIC had relied to

persuade the probation officer to recommend the upward adjustment had been taken out of context. In initially ruling on this issue, however, the court relied on Dean's testimony about her call to Agent Cain as evidence of the closeness of her relationship to Mitchell. That reliance would only have made sense if the court accepted that Dean in fact had told the truth about the call to Cain.

Dean did not press this issue further on appeal. In its appellate brief, however, the OIC continued to rely on Cain's testimony about the call to contradict Dean.

The treatment of the Cain matter in the district court was complicated by the fact that Dean had raised other issues regarding Agent Cain's credibility based on his responses to certain questions on cross-examination. In support of a claim that certain responses were evasive or false, Dean described in her affidavit a party she said was attended by Cain that she had paid for and her efforts to cause Cain and others to investigate a particular project. The OIC produced material showing, apparently conclusively, that Cain was not at the party described by Dean and raising an issue regarding Dean's account of initiating an investigation of the project. That Cain was not at the party described by Dean may have influenced the district court in its treatment of the matter. Yet, the totality of materials does not support a contention that Dean intentionally misstated any facts in her affidavit. Moreover, the OIC's efforts to focus attention on that matter, and away from the issue of the whereabouts of the check, further reflect the OIC's dishonesty in addressing the Cain matter. For example, in an effort to cast doubt on Dean's credibility, the OIC raised an issue about the legitimacy of a receipt that bore an erroneous date--May 28, 1986, rather than May 29, 1985--and Dean's mother's name rather than Dean's own name, though no reasonable person could possibly believe the receipt was other than what it was represented to be. In any case, however, the facts presented in the Cain Appendix would lead most observers to believe that Cain had in fact lied and that, at least at some point in time, OIC attorneys came to believe that he had lied, or that, at a minimum, whether Cain had lied and whether OIC attorneys knew he had lied is a matter the government could readily determine.

Any effort to interpret the OIC's actions with regard to Agent Cain's testimony must take into account the OIC's demonstrated misconduct elsewhere, particularly its actions with regard to the use of witnesses where the OIC had strong reason to believe the testimony was false, as in the cases of Thomas T. Demery and Ronald L. Reynolds mentioned above, as well as the

cases of Eli M. Feinberg and Maurice C. Barksdale discussed below. It must also take into account the importance of the testimony of an African-American government agent in directly contradicting the testimony of a white defendant before an entirely African-American jury, in a context where the court several times chastised O'Neill for treating the defendant in a manner he would not have done but for the racial difference between the jury and the defendant.

As discussed in the Addendum to the Cain Appendix, as well as in a number of the letters, at a meeting during the week of December 12, 1994, Associate Deputy Attorney General David Margolis raised the issue of whether, assuming that Dean had in fact called Agent Cain, it necessarily followed that Cain had testified falsely. I understood Mr. Margolis' question to go to whether it was possible that Dean did not accurately recount the specifics of her call to Cain or that, though Cain did remember that Dean called him, his responses to O'Neill's questions did reflect his best recollection of the specifics of the call. In response to Mr. Margolis' question, I pointed out that it seemed that, assuming Dean had called Cain, it did not seem possible that Cain responded truthfully to O'Neill's question of whether Dean had mentioned that the report indicated Mitchell earned money as a consultant.

Yet, any possibility that Cain's testimony was literally true, though affecting Cain's culpability for perjury, makes the OIC's conduct in the matter no less heinous. Presumably, if the OIC fulfilled its obligation to investigate the issues raised in Dean's motion, OIC attorneys did know shortly after Dean filed her motion (if they did not know it earlier) that Dean had called Cain and had learned from him that the check was maintained in a HUD field office. Thus, one is still left with the situation that, on January 18, 1994, though knowing that Dean had made the call to Cain, Independent Counsel Arlin M. Adams wrote the U.S. Probation Officer arguing to have Dean's sentence increased because she had lied in testifying that she made the call. One is also left with the situation that, at the hearing on February 22, 1994, though knowing that Dean had learned that the check was maintained in a HUD field office from her call to Cain, Deputy Independent Counsel Bruce C. Swartz argued to the court that Dean in fact had surmised that the check was maintained in a field office from an entry in the HUD IG report and therefore should have her sentence increased for falsely stating that she learned this from a call to Cain.

Indeed, that the OIC believed that it had a rationale by which Cain's statements were literally true is most significant

in that it would seem to render it all the more likely that both when O'Neill elicited from Cain testimony aimed at leading the jury to believe that Dean had not called Cain at all, and when he later engaged in inflammatory argument aimed also at leading the jury to believe that Dean had not called Cain at all, O'Neill and other OIC attorneys, including Swartz, knew for a fact that Dean had called Cain.

B. Testimony of Eli M. Feinberg

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony." The matter has not been addressed in documents filed with the court.

One of the projects the Superseding Indictment alleged Dean caused to be funded for the benefit of Mitchell was Park Towers, a 143-unit moderate rehabilitation project in Dade County, Florida, which was funded as a result of HUD actions in 1985 and 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Martin Fine secured the services of a Miami consultant named Eli M. Feinberg in order to assist in securing HUD funding for Park Towers. Feinberg then secured the services of Washington political consultant Richard Shelby, who then retained John Mitchell. Though Shelby at times communicated directly with Fine, for the most part it was Feinberg who kept Fine apprised of Shelby's progress in securing funding for the project as well as in securing a later waiver of certain HUD regulations. Fine ultimately would pay \$225,000 to Shelby's employer, The Keefe Company, which paid Mitchell a total of \$50,000 in connection with the Park Towers project.

There were many undeniable instances of prosecutorial misconduct with regard to Park Towers. The central premise underlying the charge concerning that project was that Shelby secured Mitchell's services because of Mitchell's relationship to Dean. Yet prior to issuance of the Superseding Indictment, Shelby, already under a grant of immunity, had told OIC attorneys that he did not know of Mitchell's relationship to Dean until after he had secured Mitchell's services, and, after learning of the relationship, ceased to seek material assistance from Mitchell. Shelby also had told OIC attorneys that he did not believe Dean was aware of Mitchell's involvement in the project and that he (Shelby) had sought to conceal Mitchell's involvement from Dean. Shelby also had told OIC attorneys that a



conspiratorial reference to "the contact at HUD" in a Martin Fine memorandum was not a reference to Dean. Yet, these and other statements of Shelby specifically contradicting inferences in the Superseding Indictment would be withheld from the defense for more than a year while the OIC explicitly represented to the court that it was aware of no exculpatory material. During trial, the OIC would attempt to cause the jury to believe, among other things OIC attorneys knew or believed to be false, that the reference to "the contact at HUD" was in fact a reference to Dean and that Dean had provided Shelby with copies of two internal HUD documents.

The Superseding Indictment had alleged that the co-conspirators involved in Count One would tell their developer/clients that Mitchell was Dean's stepfather. Ultimately, however, the OIC would instead argue that Shelby had concealed Mitchell's involvement from Feinberg and Fine, and that argument would play a large role in the OIC's attempt to show that Shelby, Mitchell, and Dean were involved in a conspiratorial relationship.

The key testimony in this regard would be that of Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Feinberg on May 18, 1992, Shelby, already under a grant of immunity, had told representatives of the OIC that he had told Feinberg about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Martin Fine. The second instance in which Shelby informed the OIC that Feinberg was aware of Mitchell's role occurred in an interview, conducted by Bruce Swartz and Robert O'Neill on May 18, 1992.<sup>2</sup> That same day, Swartz and O'Neill conducted a telephonic interview Feinberg, in which Feinberg stated that he was not aware of Mitchell's involvement in Park Towers. Feinberg's interview report indicates that he was not at that time advised by Swartz or O'Neill OIC that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, the day following the telephonic interview of Feinberg, Shelby was interviewed again by Swartz and O'Neill. In the interview Shelby was apparently

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<sup>2</sup> In the Park Towers Narrative Appendix (at 40 n.29), it is stated that it is believed that the May 18, 1992 telephonic interview of Eli Feinberg was conducted by Robert O'Neill, and in the Cain Narrative Appendix (at 35) it is stated that it is believed that Bruce Swartz conducted the May 19, 1992 interview of Shelby. It appears that, in fact, the May 18, 1992 interview of Shelby, the May 18, 1992 telephonic interview of Feinberg, and the May 19, 1992 interview of Richard Shelby were all jointly conducted by Bruce Swartz and Robert O'Neill, along with Special Agent Jocelyn Heaney.

advised that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of Feinberg's role in determining Mitchell's fee. That day, the OIC also reinterviewed Clarence James, Shelby's employer, who had previously stated that he was unaware of Mitchell's involvement with Park Towers. In the May 19, 1992 interview, confronted with information indicating that he had approved payments to Mitchell, James acknowledged that he must have been aware of Mitchell's involvement.

There were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement with the Park Towers project, including the fact that national magazines had suggested that Dean improperly made decisions to benefit Mitchell. There was also reason to expect that confronted with Shelby's statements, Feinberg, like James, would acknowledge that he had been aware of Mitchell's involvement. Nevertheless, so far as Feinberg's Jencks materials reveal, between the time of Feinberg's May 18, 1992 telephonic interview and his being called to testify under oath, on September 17, 1993, that he was unaware of Mitchell's involvement, OIC attorneys never confronted Feinberg with Shelby's statements.

At trial, without advance notice, the OIC would put Shelby on the stand out of order and ahead of Feinberg. The evening before Shelby testified, O'Neill had advised the court of the likely witnesses for the following day, and the description had not included Shelby. This would occur just three days after the OIC turned over to the defense Shelby's Jencks materials that contained the three statements by Shelby that Feinberg was aware of Mitchell's involvement with Park Towers. Those statements appeared at various places among ten items of Shelby materials then being provided, including interview reports running as long as 27 single-spaced pages. The Shelby materials were provided along with voluminous Jencks material for 35 other witnesses.

Then, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, Associate Independent Counsel O'Neill would avoid any questions that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, O'Neill changed the subject. Shortly after Shelby finished his second day of testimony, the OIC then called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Associate Independent Counsel Paula A. Sweeney directly elicited Feinberg's sworn testimony that he was unaware of

Mitchell's involvement with Park Towers. The OIC subsequently elicited sworn testimony to the same effect from Martin Fine.

In closing argument, in addition to seeking to cause the jury to draw various false inferences and otherwise seeking to lead the jury to believe things that OIC attorneys believed to be false (as documented throughout the materials), Associate Independent Counsel O'Neill would give special attention to the testimony that Eli Feinberg and Martin Fine were not aware of John Mitchell's involvement with Park Towers, asserting that secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Shelby would have contradicted Feinberg's testimony, O'Neill would make a special point of the fact that the testimony was unimpeached.

Specifically, O'Neill stated:

[Dean's counsel] mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?

Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid \$225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

The supposed concealment by Shelby of Mitchell's involvement with Park Towers also would be an important feature of the OIC's brief in the court of appeals.

As with the testimony of Agent Cain, the OIC's actions with regard to the testimony of Eli Feinberg must be appraised in the context of demonstrated OIC actions with regard to other witnesses who OIC attorneys had strong reason to believe were testifying falsely.

C. The John Mitchell Messages and the Testimony of Maurice C. Barksdale

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale."

Count One of the Superseding Indictment alleged that Dean had caused 293 units of moderate rehabilitation subsidy to be allocated to Dade County, Florida in order to benefit Mitchell. The units would go to the Arama project of developer Aristides Martinez, who had retained former Kentucky governor Louie B. Nunn to assist in securing moderate rehabilitation funding. Nunn paid Mitchell \$75,000 for his assistance on the matter. The funding occurred as a result of documents signed in mid-July 1984 by Maurice C. Barksdale who was then Assistant Secretary for Housing. This occurred several weeks after Dean assumed the position of Executive Assistant.

Mitchell had died in November 1988. Mitchell's files, which were secured by the OIC in May of 1992, contained telephone message forms indicating that in January 1984, at the same time Nunn was working out a consultant agreement to secure 300 moderate rehabilitation units for Martinez, Mitchell was talking to Dean's predecessor, Lance H. Wilson, about securing 300 units, and that Wilson had told Mitchell he was talking to Barksdale (then Acting Assistant Secretary for Housing) about the units. Mitchell knew Wilson and had previously sought his assistance on HUD matters involving Nunn and Martinez, and in May 1992, OIC attorneys had asked Martinez about whether Nunn knew Wilson or Barksdale. Though the Superseding Indictment alleged that Dean had caused the Arama funding in order to benefit Mitchell, the OIC would not turn the Mitchell messages over under Brady, a failure the court of appeals later would find to be deplorable.

More to the point here, as the OIC would eventually acknowledge, it brought Barksdale before the grand jury and called him to testify in court for the purpose of tying Dean to the Arama funding without ever confronting Barksdale with the information contained in the Mitchell message indicating that Wilson had been talking to him (Barksdale) about the matter. It did so notwithstanding the existence of a number of factors that would give Barksdale reason not to admit that he had made funding decisions at the behest of Wilson. In eliciting Barksdale's testimony in court, O'Neill focused the inquiry solely on the period after Wilson had left HUD, and asked no questions about the messages or about Wilson. On cross-examination, Barksdale testified that he did not recall that Wilson had talked to him

about the matter and that he believed that he would remember it if Wilson had. Though the Mitchell message gave O'Neill reason to believe with virtual certainty that this testimony was false, O'Neill made no effort to correct that testimony.

In finding that there was sufficient evidence to sustain a conviction with regard to the Arama project, the court of appeals relied principally on a letter Dean had written to Nunn in July 1984, in which she referenced a conversation with Mitchell and informed Nunn that documents were being prepared and that the units would definitely go to the Arama project. Dean wrote the letter on HUD stationery and had a copy of it placed in her chron files. She testified that Mitchell had called her asking about the status of a funding, that she had asked Barksdale about the matter, and that she merely communicated to Nunn what Barksdale told to her. Barksdale, however, testified that he did not recall Dean's talking to him about the matter.

I suggest that you consider the following concerning the three matters discussed under the above headings, and elaborated more fully in the enclosed materials. Few readers of the materials regarding Barksdale would have any doubt that the reason OIC attorneys failed to confront Barksdale with the information on the Mitchell messages was the concern that it would cause Barksdale to acknowledge that Wilson had spoken to him on the matter and possibly that he (Barksdale) had caused the funding at Wilson's behest without involvement of Dean.

Nor would they doubt that OIC attorneys went forward in the hope that Barksdale would lie under oath in a manner that would support the OIC's case more than the truth would support the case. Similarly, assuming that OIC attorneys never confronted Feinberg with Shelby's statement that Feinberg was aware of Mitchell's involvement, there seems little room for doubt that the failure to confront Feinberg with Shelby's statement was motivated by the concern that it would cause Feinberg to state truthfully that he did know of Mitchell's involvement. Instead, OIC attorneys elicited Feinberg's testimony concerning Mitchell while believing that it was very probably, if not certainly, false. Further, in all probability, when O'Neill made his representations to the court as to the witnesses he intended to call on September 16, 1993, choosing words would that did not include Shelby, O'Neill in fact intended to call Shelby. Finally, it is worth noting that in O'Neill's enthusiastic belaboring of the absence of any contradiction of Feinberg's testimony, it is difficult not to discern an element of boasting at his success in causing the testimony to go unimpeached

notwithstanding that it was directly contrary to statements of an immunized government witness and notwithstanding that it was almost certain false.

With regard to the Cain testimony, I think few readers would doubt that when responding to Dean's motion and seeking to have Dean's sentence increased for perjury, Swartz believed that Dean had called Cain asking about the check. Though in the materials I draw a distinction between the OIC's actions before and after receipt of Dean's motion that provided my affidavit and raised the issue of the whereabouts of the check, given the documented instances of eliciting testimony OIC attorneys had strong reason to believe was false, it is difficult to doubt that O'Neill believed with virtual certainty that Dean had called Cain when he elicited Cain's sworn testimony to the contrary. Further, it seems abundantly clear that O'Neill engaged in these actions with the full knowledge of Swartz, if not in fact specifically at the direction of Swartz and Adams.

Please do not believe that the matters just described by any means comprise the totality of serious prosecutorial abuses even as to Count One. Yet, I suggest that the documented misconduct solely concerning these issues would lead most conscientious observers to conclude that Bruce Swartz and Robert O'Neill are unfit to serve as attorneys for the United States Government and that they engaged in conduct that, if it does not constitute prosecutable crimes, ought to constitute prosecutable crimes. Further, review of all the evidence detailed in the materials I provided would lead such observers to believe that, at least as to Count One, under the supervision of an Independent Counsel who believed that John Mitchell had denied him an appointment to the Supreme Court, Bruce Swartz and Robert O'Neill conspired with others, including the recent Assistant Attorney General for the Criminal Division, to fabricate a claim that Deborah Gore Dean and John Mitchell engaged in a criminal conspiracy and to use false evidence to establish that claim in the eyes of a jury.

It is of course possible that I have misinterpreted some action or motive in the extensive materials I have provided. But I have no doubt, as any thoughtful reviewer of the materials would have no doubt, that for each instance where a careful investigation of the allegations in the materials would disclose facts causing any action of Bruce Swartz or Robert O'Neill to be seen in a less damning light, such investigation would reveal some number of serious prosecutorial abuses that have so far gone undiscovered.

Each level of supervision over the named attorneys has a responsibility in this matter, and, in any case, each level of supervision ought to be fully apprised of the nature of the allegations in order to effectively oversee the conduct of those attorneys. Accordingly, with regard to Robert O'Neill, I am at this time providing copies of the enclosed materials and my letter to you to the Honorable Charles R. Wilson, United States Attorney for the Middle District of Florida.

As with my earlier actions in this matter, in seeking the removal from federal service of Bruce Swartz and Robert O'Neill, I in no manner represent Deborah Gore Dean.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: The Honorable Janet Reno  
Attorney General

Larry D. Thompson, Esq.  
Independent Counsel

Enclosures

cc: The Honorable Charles R. Wilson  
United States Attorney  
Middle District of Florida